

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMOND ANTHONY SPIKES,

Defendant and Appellant.

A148920, A149766

(San Mateo County
Super. Ct. No. SC082799A)

In the early morning hours of April 13, 2014, defendant Demond Spikes escorted Brigid Palmer to the home of Marcus Brackinridge, where Palmer engaged in an act of prostitution with Marcus. After Palmer texted defendant that she was having trouble with Marcus, defendant—Palmer’s pimp—went into the Brackinridges’ yard, where he encountered Marcus. Defendant pulled out a gun and, after a brief tussle, killed Marcus with two shots, also shooting Marcus’s mother, who had awakened and witnessed the murder of her son from inside the family home. A jury found defendant guilty of first degree murder, shooting at an inhabited dwelling, and felon in possession of a firearm, and found true two allegations of discharge of a firearm causing great bodily injury or death pursuant to Penal Code section 12022.53, subdivision (d). Defendant was sentenced to an aggregate term of 124 years to life in state prison, which included 25 years to life for each of the section 12022.53 enhancements.

Defendant asserts the following errors: (1) the first degree murder finding was unsupported by substantial evidence because there was insufficient evidence of premeditation and deliberation; (2) the trial court erred in excluding third party

culpability evidence; (3) the trial court erred in admitting pimping and prostitution evidence; (4) the prosecutor committed misconduct by eliciting inadmissible bad character evidence in the form of defendant's prior acts of violence against prostitutes and then arguing defendant's bad character during closing argument; (5) defense counsel provided ineffective assistance by failing to object to the bad character evidence; (6) defendant was deprived of due process due to cumulative prejudice; and (7) the matter must be remanded for resentencing to allow the trial court to exercise its discretion with regard to the Penal Code section 12022.53 enhancements in light of a recent amendment to the statute that makes the imposition of the enhancements discretionary.

Defendant's argument pertaining to resentencing is well taken. All others lack merit. We thus reverse and remand for the sole purpose of allowing the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h). In all other regards, we affirm.

EVIDENCE AT TRIAL

A. The Shooting of Marcus Brackinridge and Sandra Alexander

In April 2014, Marcus Brackinridge lived with his father, Eugene Brackinridge, Sr.; his mother, Sandra Alexander; and other family members in a home on Skyline Drive in Daly City.¹ On the evening of April 12, Marcus left the house to meet up with friends at various establishments, leaving the last one around 3:00 a.m. on April 13.

Sometime after that, Eugene heard Marcus return home. He fell asleep but was later awakened by what sounded like a rock hitting Marcus's window and then voices in the backyard outside Marcus's bedroom. Five or so minutes later, he heard Marcus asking someone, "You come to my home?"

Eugene got up and opened a sliding glass door that led from his bedroom out to the backyard. He saw a blond woman moving her arms in a striking motion downwards toward what he assumed was a person on the ground. He turned and woke up Alexander,

¹ To avoid confusion, we refer to Marcus and Eugene by their first names.

telling her he thought Marcus was having an argument with his girlfriend. Alexander got up and joined him at the sliding glass door.

About 10 steps away, Eugene saw two blue “flares” and heard two pops. In the area where he saw the flares, he saw the shadow of a man who appeared to be straddling a person on the ground. The flares were aimed down at the person on the ground. Eugene was confident it was a man, not the blond woman, who fired what were in fact gunshots.

Alexander, who was standing behind Eugene, yelled out, “Don’t shoot my son.” A bullet shattered the sliding glass door and struck her in the leg. Eugene saw the man run out of their yard through a side gate. He then turned his attention to Alexander, who was bleeding heavily from a gunshot to her leg.

At trial, Eugene did not recall telling the police in an initial interview that he only saw two people—Marcus and a blond woman—in the backyard, despite that when he was specifically asked during the interview if he had seen a third person, he had responded, “I didn’t see a third person.” In a subsequent police interview, Eugene said he saw three people: Marcus, a blond woman, and a man he did not recognize.

Alexander testified that she looked out the sliding glass door and saw a man who was not Marcus standing over another person on the ground. She saw five or six “flashes of fire” as the man repeatedly shot the person on the ground. She yelled, “Hey, what are you doing?” The man stopped, turned the gun towards her, and shot her in her leg.

Members of the household called 911 at 5:49 a.m. Daly City police officers responded within minutes and found Marcus lying naked on the ground in the backyard. He died shortly thereafter from two gunshot wounds, one to the left side of his torso and one to his forehead. The shot to the torso passed through his spinal column and would have caused paralysis to his lower body that would have resulted in him falling to the ground. The shot to the forehead alone would likely have been fatal.

B. Forensic Evidence

A sweater and a used condom found in Marcus’s bedroom contained the DNA of a prostitute named Brigid Palmer. Strands of Palmer’s hair, which was long and blond,

were found on the sweater and in Marcus's bed. Her DNA was also found on a pair of black cotton pants and a tissue recovered from the intersection of Skyline Drive and Northridge Drive in Daly City. Neither the sweater nor the black pants contained gunshot residue, nor was there blood on the pants.

A hat found in the Brackinridges' backyard contained defendant's DNA and gunshot residue.

C. Text Messages on Marcus's Cell Phone

Marcus's cell phone, which was found in his bedroom, contained a contact for "Layla BBW," whose phone number was registered to Palmer. The phone contained a series of texts exchanged between Marcus and Palmer on April 12 and 13, 2014. Most of Palmer's texts were missing, leaving only Marcus's side of the conversation. The text exchanges included the following:

At 12:24 a.m. on April 12, Marcus texted Palmer, "Can you come to Daly City," followed by his address. Marcus then texted, "Ok. Text me when you're outside. I can come out. Don't knock on the door." At 1:01 a.m., Marcus texted, "I'm coming out," and "Let's go get a room now come pick me up and lets kick it."

At 2:28 a.m., Marcus began another text exchange with Palmer, texting her, "Thank you, sexy. You're beautiful." She responded, "You are welcome." A few minutes later, he texted, "Can't wait until next time. Maybe all night. I'm a chef in Mill[b]brae. So I can get a room. I'll always come be with you. I work from 9:00 to 6:00 p.m." His next text to her included, "Ok, sweetie. Don't leave town, sexy. I want to see you soon." He then texted her, "Have a good night, baby, and be safe. Glad I met you." His final text in the exchange, at 2:46 a.m., said, "No, thank you. Wooooooo. Next time I'm really going to make long sweet passionate love to you."

At 9:14 a.m. that same day—April 12—Marcus began another text exchange with Palmer, telling her he was "going to need [her] tonite, sweetie." At 4:45 p.m., Palmer responded, "At your house again?" They then exchanged a series of texts making plans for meeting that evening.

In the early morning hours of April 13, another exchange occurred, beginning with Marcus texting Palmer, “[I’m] leaving the Reggae spot. I want to see you,” followed by a text asking, “You still cumin?” He then sent multiple texts asking her to come to his house, including one at 3:14 a.m. asking, “Can you cum now 400.” After a series of texts about Palmer’s whereabouts and her timing, at 4:38 a.m., Marcus texted Palmer, “You cummin?”; she replied, “I’m here.”

D. Courtney S.

A woman named Courtney S. testified at length at defendant’s trial. Courtney began a relationship with defendant in 2012 when she was 19 years old and, at his request, engaged in prostitution during their relationship. She testified about her history with defendant and about conversations she had with him on April 13, 2014 and at other times about his role in Marcus’s murder. Specifically:

On April 12, 2014, Courtney was working as a prostitute at the Bunny Ranch in Nevada. Late that night and early the next morning, she and defendant had multiple phone conversations, including a conversation around 2:00 or 3:00 a.m. on April 13 in which defendant told her that he and Palmer were going to Daly City so Palmer could engage in prostitution with a client she had seen before. Courtney again spoke to defendant after he and Palmer had arrived at the client’s house. Defendant, who was sitting in a car out in front of the house while they spoke, told her Palmer was inside with the client and was planning on “drinking him to sleep” and then robbing him. Their phone call was interrupted when defendant received a text message from Palmer, who was having trouble because the client would not let her leave. Courtney was unable to get ahold of defendant for hours after that, and when she finally did speak to him, he and Palmer were at the home of a woman named Angela Knapp, who was the mother of defendant’s child.

Around noon that day—April 13—defendant arrived at the Bunny Ranch in a rental car. He told Courtney that Palmer had run into trouble with the client and he had gone in to help and had shot the man. While he did not provide details at the time, in later conversations he told her that he and Palmer had driven to the house in Daly City in

Knapp's car, with Palmer driving and him asleep in the passenger seat. When he went to help Palmer, she and the client, who was naked, came out of the client's house. As Palmer was trying to get away from the client, defendant approached him and pulled out a gun, and he and the client got into a tussle over the gun. As they were struggling, they fell into a bush, and defendant lost his hat. Defendant then stood up and shot the client. He was certain he had shot him in the abdomen and was pretty sure he had shot him in the head as well. He heard a scream coming from a door, and he shot a woman through a sliding glass door.

Defendant told Courtney he and Palmer had gone to Knapp's following the shooting because he needed to get cleaned up. He had tried unsuccessfully to wash the blood out of his clothes and ended up burning them.

A week or so after Marcus's murder, Courtney searched the internet because defendant wanted her to find out if the police had a suspect. Through her internet search, she learned the name of the victim and that he had in fact been shot in the head.

On October 8, 2014—six months after the murder—defendant called Courtney from his car and told her he had been pulled over for running a red light and was “going down.”

Courtney was interviewed by two detectives in June 2015. She told them what defendant had told her about the events of April 13, 2014. It was one of the hardest things she had ever done because she wanted to marry defendant and have a family with him.

E. Angela Knapp

Angela Knapp testified that defendant, who went by the name “Feddie,” sometimes drove her car, had spent time at her house, and had access to her car keys in April 2014.

A Bay Bridge surveillance video from April 13, 2014 showed Palmer and another person in a car that looked like Knapp's Infiniti driving westbound at 4:16 a.m.

F. Cell Phone Records

Cell phone records showed that between 4:00 a.m. and 5:00 a.m. on April 13, 2014, Palmer's phone traveled from the San Leandro/Hayward/South Oakland area through San Francisco and down the peninsula to Daly City. A text was sent from her phone to defendant's phone at 5:40 a.m., and a call was made from her phone to defendant's phone at 5:46 a.m. Cell phone mapping showed that the text and call from Palmer's phone were made in the area near the Brackinridge home.

Records also showed that defendant's cell phone, which was registered to "Al Feddie," was in the South San Francisco/Daly City area at 4:58 a.m. on April 13, 2014. The records further showed that at 5:17 a.m., his phone received a call, at which time the phone was in the same cell sector as the Brackinridge home.

Defendant's cell phone contained various photos and videos, including of the steering wheel of an Infiniti, Courtney, defendant's driver's license, stacks of money, defendant wearing a hat, and internet ads for prostitution.

G. Pimping and Prostitution Evidence

1. Defendant's Pimping History

Four women testified about their experiences with defendant and prostitution. Courtney testified that after she and defendant began dating in 2012, they needed money, and defendant asked her to prostitute herself. She did not want to do it, but he talked her into it. He would drive her to different locations, where she would walk the streets while he watched nearby. Courtney also advertised her services on the internet through ads that were sometimes created by defendant. When she had a "date," she would call him and put her cell phone on speakerphone so he could hear the entire transaction. One time, he was listening when she was attacked by a client, and he saved her life by yelling through the phone that he was coming with a gun, even though he was in California while she was in Washington, D.C. After each date, she always gave defendant all of the money.

Courtney regularly told defendant she wanted to stop prostituting, but he would get mad and tell her they needed the money. He would also get "[v]ery violent" with her. He expected that she not speak to men who were not clients and that she remain in phone

contact with him at all times; if she disobeyed, “[h]e’d beat [her] ass.” After a date, if she did not bring him the amount of money he expected, he would beat her up.

Defendant told Courtney about other girls that had prostituted for him, one of whom was Palmer. He told her Palmer would rob her clients and do “crazy things” and he would have to save her, having physically fought her clients many times.

In 2014, Courtney saw defendant with two different guns, one of which he brought with him when he accompanied her to meet clients.

Laura P., a prostitute who knew defendant and Palmer, testified that when she met Palmer, Palmer was prostituting for defendant. Laura stopped prostituting five years before trial and was in the witness relocation program when she testified.

Angelica G. had dated defendant for a few months when she was 18 years old. Defendant asked her to prostitute herself, but she refused.

W.C. dated defendant for almost two years, beginning when she was 18 years old. At his request, she prostituted herself a few times. She broke up with him when she found a text on his phone to Angela Knapp saying he loved her.

2. Defendant’s Rap Lyrics and Texts

Courtney gave journals and papers belonging to defendant to the police. One journal entry was a handwritten ad for prostitution. The journals also contained rap lyrics in defendant’s handwriting, the following of which were read to the jury:

– “All the honies love me like Mac & Cheese [¶] Producin’ money for they daddy like factories [¶] Contribute to the swag kicks and jeans 650 [¶] Or the jag equipped with screens.” Courtney testified that “daddy” was what she called defendant and refers to a pimp, and the lyrics were about Courtney making money as a prostitute.

– “Yo hoes ain’t loyal ‘cause your game ain’t thorough [¶] Hollering about as pimps chasing nuts like a squirrel.” According to Courtney, “hoes” refers to prostitutes, and the “game” is “prostituting, pimping . . . hustling.”

– “Who am I? Tic Feddie. [¶] I was born a son to Mary Jamison and Harold Spikes [¶] Little brother, nephew, grandson.” Courtney knew defendant by the

nicknames “Tic,” which was short for lunatic, and “Al Feddie, no feelings,” feddie being a slang term for money.

– “Disrespectin’ a pimp get your face slapped [¶] It is what it is and ain’t nothing gonna change that.” Courtney testified that that was consistent with how defendant treated her when she was prostituting for him. If she did something he viewed as disrespectful, he would beat her.

Courtney also identified texts defendant sent her. One read, “I should fuck you up when I see you, hoe, but I got good game so I’m just gonna peel . . . your back and collect my trap.” Courtney explained “trap” means money. Another read, “You out of pocket wayward hoe. Each time you don’t pick up this ass-whooping you got coming gonna be that much worse.” Courtney said this meant that she had “an ass whooping coming because [she] wasn’t picking up the phone,” and she agreed that was an example of when there was a violent consequence if she did not do what defendant told her to do or was disrespectful.

3. Expert Testimony Regarding Pimping and Prostitution

FBI Special Agent Martha Parker provided the following expert testimony on pimping and prostitution: A pimp manipulates and exploits a prostitute to make money for himself. He provides logistical support for the prostitute and, in exchange, takes all of her money. That logistical support can include providing a ride to and from a meeting with a client, paying for a hotel room for the meeting, and advertising the prostitute’s services on the internet. The pimp usually remains in the area while the prostitute meets with the client, in part to provide security if needed. A pimp “wants to protect his commodity as he sees these prostitutes. They’re just a way for him to make money so of course he wants to protect his goods.” Pimps typically do not feel any real romantic or personal attachment to their prostitutes, whom they see as replaceable. Pimps demand loyalty from their prostitutes, often physically assaulting a girl who is not loyal or has a bad attitude.

PROCEDURAL BACKGROUND

On February 24, 2015, the San Mateo County District Attorney filed an information charging defendant with four felonies: the murder of Marcus Brackinridge (Pen. Code, § 187)²; the deliberate and premeditated attempted murder of Sandra Alexander (§§ 187, 189, 664); shooting at an inhabited dwelling (§ 246); and felon in possession of a firearm (§ 29800, subd. (a)(1)). The information also alleged that defendant discharged a firearm causing death or great bodily injury in counts one through three (§ 12022.53, subd. (d)), had suffered one prior juvenile robbery adjudication (§ 1170.12, subd. (c)(1)), and had served two prior prison terms (§ 667.5, subd. (b)).

Defendant was tried before a jury in May and June 2016. On June 9, the jury found him guilty of first degree murder, shooting at an inhabited dwelling, and unlawful possession of a firearm, and not guilty of attempted murder. It found true the firearm enhancement allegations as to the murder and shooting at an inhabited dwelling charges.

Following a bench trial on defendant's priors, the trial court found true the prior robbery and one of the prior prison term allegations.

On July 20, the trial court imposed an aggregate sentence of 124 years to life in state prison, which included 25 years to life for each of the section 12022.53 enhancements.

That same day, defendant filed a notice of appeal (No. A148920).

The trial court subsequently held a restitution hearing that resulted in a restitution award to Alexander of \$223,998.18 for medical expenses, Marcus's funeral expenses, and repairs to the Brackinridge home.

On November 3, defendant appealed the restitution order (No. A149766).

On defendant's motion, we consolidated the two appeals for purposes of briefing, oral argument (if any), and decision.³

² All undesignated statutory references are to the Penal Code.

³ Defendant's consolidated opening brief asserts no argument concerning the restitution award. We thus consider appeal No. A149766 abandoned and dismiss it.

DISCUSSION

A. The Jury's Finding of Deliberation and Premeditation is Supported by Substantial Evidence

Defendant's defense at trial was one of identity, that is, that he was not the person who shot Marcus and Alexander. He does not, however, challenge the sufficiency of the evidence that he was in fact the shooter. Rather, he claims there was insufficient evidence of deliberation and premeditation to support the jury's first degree murder finding. We conclude otherwise.

Murder is the unlawful killing of a human being with express or implied malice aforethought. (§§ 187, 188.) There are two degrees of murder: first and second. (See § 189.) To support a conviction for first degree murder, the prosecution bears the burden of proving beyond a reasonable doubt one of the qualifying circumstances listed in section 189, subdivision (a). As pertinent here, one such circumstance is murder that was "willful, deliberate, and premeditated" (*Ibid.*) As defined by the California Supreme Court, " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) " 'The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216; accord, *People v. Cole* (2004) 33 Cal.4th 1158, 1224; *Koontz*, at p. 1224.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the Supreme Court identified three categories of evidence that can establish deliberation and premeditation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to

(Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 9:162, p. 9-49.)

result in, the killing—what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*Id.* at pp. 26–27.) In shorthand, the categories are “planning, motive, and method.”⁴ (*People v. Elliot* (2005) 37 Cal.4th 453, 470.)

Applying the *Anderson* factors and reviewing the evidence presented at trial in the light most favorable to the People (*People v. Marks* (2003) 31 Cal.4th 197, 230), we conclude the record contains substantial evidence that defendant’s murder of Marcus was willful, deliberate, and premeditated.

As to planning, Courtney S. testified that defendant owned two guns and would bring one with him when he accompanied her to locations where she would prostitute herself. She also testified that defendant told her he had engaged in physical violence with Palmer’s clients “many times” because Palmer would do “crazy things” and he would have to save her. The evidence also showed that on the morning of April 13, defendant accompanied Palmer to Marcus’s house, and Palmer went inside to engage in

⁴ While courts continue to review a first degree murder conviction under the *Anderson* “tripartite test,” the three *Anderson* categories are not in fact essential to sustain a conviction for first degree murder. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; *People v. Edwards* (1991) 54 Cal.3d 787, 813 [*Anderson* factors “are not a sine qua non to finding first degree premeditated murder, nor are they exclusive”].) Rather, the *Anderson* categories “are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive.” (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

an act of prostitution with Marcus, and planned to “drink[] him to sleep” so she could rob him. Defendant remained outside in order to be available in the event Palmer needed help. When Palmer texted she was having trouble with the client, defendant went into the backyard of the Brackinridge house with his gun, drew his gun on Marcus, and ultimately shot him. The evidence that defendant—a pimp—brought a gun when he escorted Palmer—his prostitute who often did “crazy things” from which she needed rescue—on a “date” and engaged in a physical confrontation with Palmer’s client is substantial evidence of planning.

Our conclusion is supported by a myriad of cases recognizing that evidence a defendant armed himself with a weapon as he headed into a conflict is sufficient evidence of planning. (See, e.g., *People v. Morris* (1988) 46 Cal.3d 1, 23 [“when one plans to engage in illicit activity at an isolated location during the early morning hours, and one brings along a deadly weapon which is subsequently employed, it is reasonable to infer that one ‘considered the possibility of homicide from the outset’ ”]; *People v. Caro* (1988) 46 Cal.3d 1035, 1050 [evidence that defendant armed himself, among other things, supported inference of planning]; *People v. Miranda* (1987) 44 Cal.3d 57, 87 [“the fact that defendant brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance”]; *People v. Elliot, supra*, 37 Cal.4th at p. 471 [“That defendant armed himself prior to the attack ‘supports the inference that he planned a violent encounter’ ”]; *People v. Alcala* (1984) 36 Cal.3d 604, 626 [“when one plans a felony against a far weaker victim, takes her by force or fear to an isolated location, and brings along a deadly weapon which he subsequently employs, it is reasonable to infer that he considered the possibility of homicide from the outset”]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223–1224 [carrying a loaded gun at time of incident combined with perceived threatening conduct from the victim supported a plan to kill].) The jury could likewise have believed here that defendant considered the possibility of homicide from the outset when he brought a gun to confront the client that was causing trouble with his prostitute.

Defendant's argument to the contrary rests on his theory that the evidence demonstrated at most that he intended to use lethal force only in self-defense or defense of Palmer, if necessary. In support, he points to the prosecutor's argument at the hearing on a new trial motion filed by defendant, which he summarizes as follows: "[T]he prosecutor argued there was a plan to intervene in an altercation between Palmer and her client, armed with a firearm. [Citation.] The prosecutor pointed out that [defendant] could not call the police to assist Palmer, his employee. [Citation.] [Defendant] 'went into the backyard to extricate Brigid Palmer from the situation.' [Citation.] Given [defendant's] small stature, he must have understood that in some instances he would be physically overmatched and consequently he armed himself with a deadly weapon in order to essentially run his business' [Citation.] The prosecutor did not argue [defendant] had a specific plan to kill [Marcus]. [¶] A general plan to defend oneself or another with potentially lethal force if necessary would not support conviction of first-degree murder." This argument fails for four reasons.

First, defendant's reliance on the prosecutor's post-trial argument—which, it should go without saying, is not evidence—is misplaced. Our review concerns only the evidence presented to the jury in determining whether there was substantial evidence to support the jury's first degree murder finding.

Second, defendant's assertion is factually wrong, as the prosecutor did in fact argue that defendant planned to use lethal force: "[Defendant] traveled to the victim's residence under circumstances in which he expected there to be a physical altercation, and I don't mean the travel from the East Bay to Daly City, I mean the travel from the parked car to the backyard at Skyline Drive. He knew that Brigid Palmer had been caught stealing from the victim. Brigid Palmer had communicated that to him and he communicated that to Courtney. He went into the backyard to extricate Brigid Palmer from that situation. He knew that that was going to involve some sort of confrontation, so there was of course some forethought that was involved here. This is an individual who sort of I think created in his mind a contingency plan that if he were to encounter some resistance he would have to resort to deadly violence. And he did."

Third, defendant's theory relies on a false premise: that going into the Brackinridge yard with the intent to "protect" or "extricate" Palmer necessarily equates to intending only to use force in self-defense or defense of another—and nothing more. The jury could have found from the evidence that defendant went into the Brackinridge yard with the intent to extricate Palmer with no regard for the amount of violence he used to do so and fully willing to use lethal force even if not called for.

Fourth, even if there was substantial evidence defendant intended only to use violence in self-defense or defense of Palmer, that would not preclude our finding that there was also substantial evidence that he planned to murder Marcus. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 ["If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding"].) Rather, he would have to demonstrate *as a matter of law* that he acted in self-defense or defense of Palmer—a showing he most certainly cannot make. And indeed, he confirms he is not claiming "he was legally entitled to use lethal force in self-defense or defense of Palmer."

In short, there was substantial evidence defendant planned Marcus's murder—"the most important prong of the *Anderson* test." (*People v. Morris, supra*, 46 Cal.3d at p. 23; accord, *People v. Alcala, supra*, 36 Cal.3d at p. 627.)

As to the second *Anderson* factor, the pimping and prostitution evidence provided substantial evidence of motive, as it explained why defendant was in the Brackinridges' backyard. Special Agent Parker testified that pimps view their prostitutes as property that they will protect with force. Defendant was Palmer's pimp and had resorted to violence in the past when she needed assistance. Per the cell phone evidence and Courtney's testimony, defendant accompanied Palmer to her meeting with Marcus and remained outside the Brackinridge home while Palmer was inside with Marcus. The jury could reasonably have inferred that when Palmer texted him that Marcus would not let her leave, defendant—armed with a firearm and having a history of using violence against Palmer's clients—went in and ultimately killed Marcus in the course of operating his business.

Lastly, there is also substantial evidence relating to the manner of killing. Marcus's parents both testified that they saw a man—defendant—standing over someone on the ground in their backyard. Defendant pointed his gun downward and fired multiple times, shooting Marcus at close range. There was no evidence Marcus was wrestling with defendant at that time. Rather, Marcus—naked, unarmed, and at some point paralyzed by the shot to the abdomen—was lying on the ground in a state of vulnerability, while defendant stood over him in a position of dominance. (See *People v. Morris*, *supra*, 46 Cal.3d at p. 23 [“The fact that defendant shot the victim twice from close range could reasonably support an inference by the jury that the manner of killing was ‘particular and exacting’ ”]; *People v. Smith* (2005) 37 Cal.4th 733, 741 [“ ‘The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill” ’ ”]; *People v. Silva* (2001) 25 Cal.4th 345, 369 [“The manner of killing—multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant—is entirely consistent with a premeditated and deliberate murder”]; *People v. Thomas* (1992) 2 Cal.4th 489, 517–518 [firing at two victims with single shots to their head and neck was a manner sufficiently exacting and particular to warrant inference that defendant acted according to a preconceived design].)

Citing *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*), defendant submits that “[m]erely arming oneself with a firearm and firing, even at a person’s face or head, is insufficient” to constitute a manner of killing “ ‘so particular and exacting that the defendant must have intentionally killed according to a preconceived design,’ ” as required by the third *Anderson* factor. This disregards the evidence that he shot Marcus multiple times and at least one shot, if not both shots, was fired while Marcus was unarmed and laying on the ground and defendant was standing over him. While the gunshot to the head in *Boatman* was insufficient to establish deliberation and premeditation under the facts there (*id.* at pp. 1268–1269), the circumstances here—namely, a pimp bringing a gun to a conflict between his prostitute and her client and then

firing at the client who was unarmed, naked, and lying on the ground—support a contrary result.

Again citing *Boatman*, defendant also claims that “[i]n the absence of planning and motive evidence, the manner of killing can alone establish deliberation and premeditation only in an ‘execution-style murder.’ ” Aside from the fact that there is evidence of planning and motive, the jury could have believed that defendant executed Marcus, as he stood over and fired lethal shots at his supine and vulnerable victim.

B. The Trial Court Did Not Err in Excluding Third Party Culpability Evidence

1. Factual Background

Prior to trial, the prosecutor moved to exclude hearsay statements by Palmer to prostitute Laura P. and child protective services worker Vicky Simmons that she had shot a client in self-defense. In support of the motion, the prosecutor provided the following background:

(1) On April 25, 2014, 12 days after the murder, Laura P. contacted the police in Glendale, Arizona to report that Palmer’s son, whom Palmer had left in Laura’s care, exhibited signs of abuse and neglect. She also reported that Palmer, who was engaging in prostitution in Arizona, told her she had left California because she had been prostituting there when a man tried to kill her and she retaliated by shooting him once in the face and twice in the stomach. The police subsequently interviewed Laura, who said Palmer told her she was seeing a client at a house when the man started “ ‘flipping’ ” out and would not let her leave. She said he picked up a baseball bat and a gun, and she shot him twice in the stomach and once in the head when she tried to wrestle the gun away from him. Palmer said defendant picked her up after she texted him for help, and she and defendant disposed of the gun.

(2) On April 29, a Glendale police detective interviewed Palmer regarding Laura’s child neglect report. Asked why she was in Arizona, Palmer said she had been robbed at gunpoint by a “ ‘random person’ ” in Pittsburg, adding that she “ ‘kinda’ ” knew the person who stole her money and that she did not want to report the robbery

because “ ‘its [*sic*] kinda already been dealt with.’ ” In a follow-up interview the next day, the detective confronted Palmer about what had occurred in Daly City. Asked about any Bay Area shootings she may have been involved in, Palmer initially denied knowledge of any shooting but then admitted she had been engaged in prostitution with a client in Daly City when they got into an argument about the cost of her services and how much time she would spend with him, and he pushed her into the backyard while he grabbed an object, possibly a bat. Everything that followed was a “blur.” She said she ran from the backyard and called a girlfriend to pick her up. She claimed she had taken a cab to Daly City that evening and she learned about the shooting from the news but did not know the identity of the shooter.

(3) On May 1, Vickey Simmons, a child protective services social worker in Arizona, contacted the Glendale detective and reported that she had met with Palmer regarding Laura’s child neglect allegations. Palmer told her that she had planned to rob a client in California after he fell asleep, but he woke up and said he was going to kill her so she shot him in self-defense. According to Simmons, Palmer told her she was unaware the client had died until the detective had told her so.

(4) On June 18, Palmer was found shot to death in Oakland. During the police investigation into her murder, Blake G., a prostitute, reported that on the day of Palmer’s murder, Palmer had told her that the last time she was in the Bay Area, “ ‘Tic’ ” had killed a “ ‘trick’ ” after the “ ‘trick’ ” had tried to kill Palmer, so she and Tic were on the run. She further told Blake that she would “take the case for ‘Tic’ as long as she got a lawyer.”

(5) During the investigation, the police learned Palmer and defendant had been in regular phone communication with Courtney S. throughout the day of Marcus’s murder. On June 2, 2015, Courtney told detectives defendant had confessed to her that he killed Marcus, and he believed Palmer was going to tell someone what he had done so he was going to get rid of her.

Against this background, the prosecutor argued Palmer’s statements to Laura and Simmons that she shot Marcus should be excluded as they did not fall within the

statement-against-interest exception to the hearsay rule set forth in Evidence Code section 1230 because the statements were not inculpatory, as they described an act of self-defense, which would be a complete defense to a murder charge. The prosecutor further argued the statements were unreliable because they contained numerous contradictions. For example, Palmer told Simmons she went to the house to steal from Marcus, while she told Laura that Marcus inexplicably “ ‘flip[ped] out’ ” and refused to let her leave. She told the police she did not have personal knowledge of the shooting and found out about it from watching the news. She told another prostitute, Blake G., that “ ‘Tic’ ” had killed a “ ‘trick’ ” after the “ ‘trick’ ” had tried to kill Palmer, so she and Tic were on the run. She further told Blake that she would “take the case for ‘Tic’ as long as she got a lawyer.” Palmer’s statements to Laura and Simmons also contradicted Courtney’s statements to the detectives that defendant had told her he had killed Marcus and he believed Palmer was going to tell someone what he had done so he was going to get rid of her.

Defendant, on the other hand, contended that Palmer’s statements were in fact against her interest (specifically, the risk of civil liability of losing custody of her son and that an admission of shooting someone, even in self-defense, would be used by the prosecution to establish the identity of the shooter), and that contradictions in her statements did not make them unreliable. Instead, what mattered, he contended, was her admission that she shot and killed Marcus.

At the hearing on the motion, the trial court expressed concern about the reliability of the statements given the multiple inconsistencies. Defense counsel argued that it was not relevant whether “every single word was necessarily even true,” but rather that Palmer had said she shot Marcus. According to counsel, reliability did not mean without contradiction but that she made the statements.

The court ultimately agreed with the prosecution and excluded the statements, providing the following reasons:

“So we have a statement of Brigid Palmer who was the prostitute that arrived at [Marcus’s home] on April 1[3]th. And according to the proffered evidence, Ms. Palmer

told Ms. Laura [P.], who was a friend of hers and also a current or former prostitute that she was [prostituting] when a man tried to kill her and that . . . she . . . shot the alleged victim in the face and twice in the stomach. We know that that's inconsistent with the facts as revealed by the cause of death. There is no evidence that the alleged victim was shot three times.

“Then there's Ms. Palmer's statement to the Daly City police which is another form of evidence that's been proffered by the District Attorney where Ms. Palmer admitted that she was engaging in an act of prostitution. Some altercation occurred. An argument occurred. She ended up in the backyard with the alleged victim where she reports that a bat was used or grabbed by the alleged victim. And in that instance she did not say that she shot the alleged victim.

“Then there's the proposed or proffered testimony of Vicki [*sic*] Simmons who is the social worker that I believe [defense counsel] is referring to where Ms. Palmer reports that a john sat up in bed, said that he was going to kill her. She then acted in self defense and shot the john.

“Then you have the potential testimony of Blake G[.] where Ms. Palmer stated to [Blake] that it was the defendant who killed the trick after the trick had tried to kill Palmer. The trick being a reference to the alleged homicide victim herein.

“So you have evidence of four different versions of how Mr. Brackinridge died coming from Ms. Palmer. By telling four different versions of what occurred the statements of Palmer are inherently unreliable and not trustworthy and it is imperative in the Court's view that with hearsay evidence that the standard of reliability set forth by Evidence Code [section] 1230 [be] adhered to. And so given the lack of reliability of these statements it is the Court's view that the statements of Ms. Palmer are inadmissible despite there being arguing [*sic*] admissions against interest. And I would note finally in that regard that if she had said that she acted in self defense legally that would not be a statement against penal interest.”

2. Analysis

“In California, ‘[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.’ ([Evid. Code,] § 1230.) The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.” (*People v. Duarte* (2000) 24 Cal.4th 603, 610–611; accord, *People v. Grimes* (2016) 1 Cal.5th 698, 711.) Defendant challenges the trial court’s application of this exception to Palmer’s admissions, contending it abused its discretion in excluding the statements on the ground they were unreliable. He also contends the exclusion of the admissions violated his constitutional right to a meaningful opportunity to present a complete defense.⁵ Both arguments fail.

⁵ While the statement-against-interest exception contains three requirements, defendant does not address the first two, focusing exclusively on the trial court’s handling of the third requirement, that being the reliability of the statements. And, indeed, there was no dispute that the first requirement—unavailability of the declarant—was satisfied. It was stipulated that Palmer was deceased at the time of trial.

As to the second requirement—that the statement was against Palmer’s penal interest—that raises a more complicated question. Defendant asserts that “[t]he trial court concluded that Palmer’s statements were arguably against her penal interests” We do not construe the trial court’s statements as definitively as he. As the outset of the hearing on the prosecutor’s motion, the court began by acknowledging the question of whether Palmer’s statements were against her penal interest in light of her claim that she shot Marcus in self-defense, but went on to add that its “larger concern is the lack of reliability of the alleged statements.” There ensued discussion about the inconsistencies in Palmer’s statements. The court then summarized these inconsistencies and ruled as follows: “[G]iven the lack of reliability of these statements it is the Court’s view that the statements of Ms. Palmer are inadmissible despite there being arguing [*sic*] admissions against interest. And I would note finally in that regard that if she had said that she acted in self defense legally that would not be a statement against penal interest.” As we read the court’s findings, it did not find that the statements were against Palmer’s penal

“The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration.” (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) The proponent of the evidence must show that “the declaration was sufficiently reliable to warrant admission despite its hearsay character.” (*People v. Duarte, supra*, 24 Cal.4th at pp. 610–611; accord, *People v. Grimes, supra*, 1 Cal.5th at p. 711.) Despite that the rule clearly mandates that the statement in question be trustworthy in order to qualify for admission, defendant insists the trial court here was not permitted to exclude Palmer’s hearsay statements because they were unreliable. Our Supreme Court has held otherwise, as cases such as *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) and *People v. Butler* (2009) 46 Cal.4th 847, 866 (*Butler*) illustrate.

In *Geier, supra*, 41 Cal.4th 555, a wife gave three different statements when questioned by police about her husband’s murder. In the first, she claimed she came home from work, was unable to find her husband, and knew nothing about his death. In the second, she indicated defendant and another man (Hunter) had killed her husband to obtain insurance money. In the third, she claimed she alone stabbed her husband because he had hurt their daughter. In defendant’s trial, he sought to introduce the wife’s third statement under Evidence Code section 1230. The trial court excluded the evidence on the ground “it failed to meet the exception’s threshold requirements of trustworthiness.” It observed that the first and third statements were wholly contradictory, which indicated that at least one of the statements was unreliable. It also found that the third statement was exculpatory as it suggested an act of self-defense or manslaughter rather than murder. (*Id.* at pp. 583–584.)

The Supreme Court affirmed, concluding the trial court did not abuse its discretion in excluding evidence of the wife’s third statement. (*Geier, supra*, 41 Cal.4th at p. 585.) It agreed with the trial court’s reasoning: “As the court observed, the third statement was

interest, but rather that they might not be since she said she was acting in self-defense but that it did not matter because the statements were unreliable and thus inadmissible for that reason. This issue is moot, however, since we conclude the trial court did not abuse its discretion in excluding the statements as unreliable.

utterly inconsistent with [the wife's] initial statement, in which she told police she knew nothing of her husband's death, and also inconsistent with her subsequent statement blaming defendant and Hunter for her husband's murder. Thus, on their face, two of her three statements were absolutely untruthful, rendering the reliability of any of the statements questionable. The fact that [the wife] confessed to killing her husband in the third statement did not, by itself, establish that the third statement was any more reliable than the other two. [The wife's] admission was accompanied by an explanation that she killed her husband because she had just quarreled with him and that he had hurt their daughter. [The wife] may have believed that this explanation minimized her culpability or excused her conduct altogether. Moreover, [the wife] was having an affair with Hunter and her third statement, taking the blame for the murder with an excuse, may have been her attempt to protect him and, by extension, his confederate, defendant. Thus, we conclude that in examining [the wife's] statement in light of 'the circumstances under which [it was] uttered, [the wife's] possible motivation . . . and [the wife's] relationship to [Hunter]' [citation], the trial court did not abuse its discretion in excluding the statement." (*Ibid.*)

In *Butler, supra*, 46 Cal.4th 847, defendant challenged the trial court's exclusion of a statement made by fellow inmate Gornick to counsel and an investigator that he alone—with no involvement by defendant—had killed another inmate, although he claimed he had done so in self-defense. As the Supreme Court described the trial court's reasoning, "The court excluded the statement, noting that a declaration against interest must be so contrary to the declarant's interest that a reasonable person would not have made it without believing it to be true. The court expressed doubt that Gornick's statement was actually against his interest. His presence at the scene with a weapon in his hand was indisputable, and he claimed the killing was in self-defense and the defense of others. Furthermore, the court observed that Gornick had refused to testify about the incident even as he gave the statement, and left out critical details that would ordinarily be the subject of cross-examination, such as where defendant was and what he did during the attack. The court concluded that 'it's very convenient and very deliberate, I think,

and very intentional. And to me, it makes it untrustworthy and unreliable.’ ” (*Id.* at p. 866.)

The Supreme Court affirmed, concluding that the reasons given by the trial court “amply justified” its exclusion of Gornick’s statement. (*Butler, supra*, 46 Cal.4th at p. 866.) As the court put it: “The trustworthiness of a statement against penal interest is the focus of the inquiry, and we rely on the trial court to apply its understanding of human nature in the circumstances presented, including the declarant’s motivations and his relationship with the defendant. [Citation.] Here, the court accurately noted that Gornick attempted to justify his actions, rather than to incriminate himself. Moreover, he made his statement fully intending to insulate himself from questioning, and provided only a minimal account of defendant’s actions. These factors seriously undermined the trustworthiness of the statement.” (*Ibid.*)

As is clear from *Geier* and *Butler*, a trial court must consider the circumstances surrounding a third party’s inculpatory statement to determine whether it is sufficiently reliable to be worthy of admission as an exception to the hearsay rule. Consistent with this, the trial court here assessed Palmer’s statements, and it did not abuse its discretion in concluding that the circumstances suggested the statements were unreliable. Most significantly, while Palmer told Laura P. and Simmons she shot her client, she told Blake G. defendant had done so and she told the police everything was a “ ‘blur’ ” and she did not know the identity of the shooter. As in *Geier*, these statements were “ ‘utterly inconsistent,’ ” such that at least two of the four statements were “absolutely untruthful, rendering the reliability of any of the statements questionable.” (*Geier, supra*, 41 Cal.4th at p. 585.) Moreover, the statements were riddled with additional inconsistencies that further undermined their trustworthiness. Palmer told Laura the client just started “ ‘flipping’ ” out, while she told the police she and the client got into an argument about the cost of her services and how much time she would spend with him. She told Laura defendant picked her up after she texted him for help, while she told the police she called a girlfriend to pick her up. She told Laura the client picked up a baseball bat and a gun, while she told the police he grabbed an object, possibly a bat, and she did not mention a

bat to Simmons. She told Laura and Simmons she shot the client twice in the stomach and once in the head, even though Marcus was only shot twice. She told Laura P. she had taken a cab to Daly City, when a video recording showed her driving across the Bay Bridge. Finally, she told Blake she would “ ‘take the case’ ” for defendant, as long as she got a lawyer. All of these inconsistencies support the trial court’s finding that Palmer’s statements to Laura and Simmons that she was the shooter were unreliable and thus inadmissible.

Despite that *Geier* and *Butler* are on point, defendant urges us to disregard them, contending that *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*) and *People v. Page* (2008) 44 Cal.4th 1 (*Page*) are “the controlling California cases on exclusion of third party culpability evidence.” He argues that *Hall* and *Page*, along with *Holmes v. South Carolina* (2006) 547 U.S. 319, held that “third party culpability evidence must be admitted if it is capable of raising a reasonable doubt as to the defendant’s guilt.” These authorities do not avail defendant.

Hall, supra, 41 Cal.3d 826 rejected a heightened standard of admissibility of third party culpability evidence established by *People v. Mendez* (1924) 193 Cal. 39 and *People v. Arline* (1970) 13 Cal.App.3d 200 (the *Mendez-Arline* rule), which required “substantial proof of a probability” that someone other than defendant committed the crime. (*Hall*, at pp. 831–834.) Instead, the *Hall* court held, the evidence “need only be capable of raising a reasonable doubt of defendant’s guilt” in order to be admissible. (*Id.* at p. 833.) The case is irrelevant here, as it did not involve the admissibility of hearsay, let alone the statement-against-interest exception to the hearsay rule. Likewise *Page, supra*, 44 Cal.4th 1, which reaffirmed *Hall*’s holding that “third party culpability evidence is admissible only if it links a third party to the crime.” (*Id.* at p. 39.) And certainly neither case held, as defendant would have it, that third party culpability evidence must be admitted if it links a third party to the crime with no regard for its admissibility under the rules of evidence.

Defendant also relies on *Holmes, supra*, 547 U.S. 319, which rejected a South Carolina rule pursuant to which “ ‘the proffered evidence about a third party’s alleged

guilt’ may (or perhaps must) be excluded” “ ‘where there is strong evidence of [a defendant’s] guilt, especially where there is strong forensic evidence’ ” (*Id.* at p. 329.) The United States Supreme Court criticized the rule for considering only the strength of the prosecution’s evidence while failing to evaluate the strength of contrary evidence offered by defendant. (*Id.* at pp. 329–331.) Again, the case did not involve the issue here—the statement-against-interest exception to the hearsay rule—and we fail to see how this holding is relevant.

Defendant also heavily relies on *People v. Cudjo* (1993) 6 Cal.4th 585, 607 (*Cudjo*), claiming it held that “it was error to exclude evidence of a third-party confession under Evidence Code section 1230 as unreliable.” In construing *Cudjo* as such, however, defendant confuses the reliability of Palmer’s statements—which the trial court properly considered (*Butler, supra*, 46 Cal.4th at pp. 865–867; *Geier, supra*, 41 Cal.4th at pp. 584–585)—with the credibility of the in-court witness that would testify as to Palmer’s statements. The latter, according to *Cudjo*, is for the jury to decide.

In *Cudjo, supra*, 6 Cal.4th 585, defendant and his brother Gregory were taken into custody as suspects in a homicide case. (*Id.* at p. 600.) During defendant’s murder trial, defense counsel sought to introduce testimony by a man, Culver, who was incarcerated with Gregory and who would testify that Gregory had confessed to committing the murder. (*Id.* at p. 604.) Following an Evidence Code section 402 hearing (*Cudjo*, at pp. 604–605), defense counsel maintained that the statement was admissible under Evidence Code section 1230, while the prosecutor argued that Culver’s “demeanor, background, and relationship to the defendant, as well as the content of his testimony, made him unworthy of belief.” (*Cudjo*, at pp. 605–606.) The trial court concluded that the “evidence lacked ‘indicia of reliability,’ ” and it “would be a travesty of justice” to allow the testimony. (*Id.* at p. 606.)

The Supreme Court reversed, explaining the genesis of the trial court’s error: “[T]he trial court did not focus exclusively, or even primarily, on whether Gregory’s *hearsay statement* might be false. Instead, the court apparently accepted the prosecution’s contention that *Culver* was probably a liar who should therefore be

excluded as a *live witness*. In so doing, the court erred.” (*Cudjo, supra*, 6 Cal.4th at p. 608.) Thus, it made a distinction between the reliability of Gregory’s hearsay statement and the credibility of the in-court witness who would testify as to the statement; the trial court could properly consider the former but not the latter in deciding whether to allow the testimony under Evidence Code section 1230. (*Cudjo*, at pp. 608–609.)

As further relevant here, the *Cudjo* court discussed the reliability of Gregory’s alleged confession, stating, “[G]iven the circumstances of Gregory’s alleged statement, the trial court had discretion to conclude that it was admissible despite its hearsay character because, if made as claimed, it was probably true,” going on to note that “[b]y Culver’s account, Gregory made his statement spontaneously, while alone with an acquaintance, within hours after a murder for which Gregory, who had no alibi, was in custody as a prime suspect. Gregory tended to fit [a witness’s] description of the assailant, and much of the other evidence, in particular the incriminating shoe prints, was as consistent with Gregory’s guilt as with defendant’s.” (*Cudjo, supra*, 6 Cal.4th at p. 607.) Under these circumstances, and after an Evidence Code section 352 analysis, the court concluded it was an abuse of discretion to have excluded Gregory’s statement. (*Cudjo*, at p. 610.)

In keeping with the foregoing, the trial court here properly focused on the reliability of Palmer’s statements, not on the credibility of the witnesses who would testify to her statements. And, for the reasons detailed above, it did not abuse its discretion in concluding that the statements were insufficiently reliable to be admitted under Evidence Code section 1230.

Lastly, “the same lack of reliability that makes . . . statements excludable under state law makes them excludable under the federal Constitution.” (*People v. Livaditis* (1992) 2 Cal.4th 759, 780; accord, *People v. Smith* (2003) 30 Cal.4th 581, 629.) Defendant’s federal due process claim thus also fails.

C. The Trial Court Did Not Err in Allowing Pimping and Prostitution Evidence

1. Factual Background

Prior to trial, the prosecutor moved under Evidence Code section 1101, subdivision (b) to introduce evidence pertaining to pimping and prostitution to show a common scheme or plan of defendant working as a pimp and profiting off women engaging in sex for money, which provided him motive to protect Palmer, who was one of his prostitutes. This would, according to the prosecutor, explain his reason for being in the Brackinridge yard the night Marcus was murdered and for intervening in a violent manner. The evidence fell into three categories. First, there was evidence of defendant's prior conduct as a pimp via items found on his phone as well as the testimony of Laura P., Courtney S., W.C. (who worked as a prostitute for defendant), and Angelica G. (whom defendant attempted to recruit into prostituting when they were dating). Second, the prosecutor sought to introduce journal entries authored by defendant in which he had referenced pimping, prostitution, and gun violence. Third, the prosecutor sought to introduce expert testimony of FBI Special Agent Martha Parker regarding pimping, pandering, and human trafficking. According to the prosecutor, Special Agent Parker's expert opinion "would educate the jury about the subculture, explain to them what the role of the pimp is," which would help establish defendant's motive for committing the murder.

Defendant objected to all of this evidence. As to the evidence of his past pimping activities, he argued it did not establish a common scheme or plan or motive and was unduly prejudicial and time consuming. He contended that the issue in the case was his identity as the shooter, and any prior acts of pimping did not tend to show he was the shooter that night. Further, any common plan to engage in pimping was irrelevant because defendant was not charged with pimping. Defendant argued his journal entries were irrelevant because they were merely artistic, "expressive writings" and had no tendency to prove he committed the murder. And he argued that Special Agent Parker's generalized testimony about human trafficking and the relationship between a pimp and

his prostitute would not help the jury resolve any disputed issues in the case. Further, even if relevant, it should be excluded under Evidence Code section 352 as unduly prejudicial, confusing, and necessitating an undue consumption of time.

The trial court ultimately allowed the evidence. As to Special Agent Parker, it found her to have “the background, training and experience and expertise in the area of prostitution to help the jurors better understand how that profession works” and allowed her to testify how a pimp generally behaves, although it excluded any testimony by her specific to what occurred at the Brackinridge home. As to other pimping and prostitution evidence, the court found it relevant to defendant’s motive for being at the Brackinridge home: “So his prior activities as a pimp would then be relevant to show the continuous course of conduct that would provide for a motive as to why he would be at this location in Daly City. I think [the prosecutor] made a very good point that the jury is entitled to know from the evidence why someone would just show up in somebody’s backyard in the middle of the night and potentially commit a homicide.”

2. Analysis

a. Evidence of Defendant’s Uncharged Acts Did Not Violate Evidence Code Section 1101, Subdivision (a)

Defendant asserts four arguments challenging the admission of the pimping and prostitution evidence, the first being that the evidence violated Evidence Code section 1101, subdivision (a). That provision generally makes evidence of defendant’s prior bad acts inadmissible to show bad character or predisposition to criminality. Such evidence may be admissible, however, to prove some fact in issue, “such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident” (*Id.*, subd. (b).) According to defendant, evidence that he, in the words of the prosecutor, “ ‘is a man who has for years made a living . . . off the backs of women who he’s exploited to engage in prostitution’ [was] not relevant to prove motive for being at the Brackinridge home with Palmer” and was only introduced “to show he is a person of bad character.” We disagree: the evidence of defendant’s history as a pimp was directly relevant to his motive for being at the Brackinridge house on the night of Marcus’s murder.

As noted, defendant presented an identity defense at trial. To prove defendant was in fact the shooter, the prosecutor sought to establish that he had a reason to be at the Brackinridge house on the night of Marcus's murder. That reason was that Brigid Palmer was going to Marcus's house to engage in an act of prostitution, and defendant was accompanying her as her pimp and would be staying in the area to be available in the event she ran into trouble and to collect his money. The pimping and prostitution evidence tended to prove that defendant had a long history as a pimp and was in fact Palmer's pimp. It explained how defendant, Palmer, and Marcus all came together in the middle of the night and why defendant had reason to shoot Marcus, a stranger with whom he had no prior connection. This evidence thus went directly to defendant's motive, and did not merely portray him as "a person of bad character," as he would have it. (See *People v. Scally* (2015) 243 Cal.App.4th 285 [rejecting defendant's claim that admission of his texts regarding pimping violated section 1101, subdivision (a) because they were relevant to the issue of intent to commit pimping].)

b. The Trial Court Did Not Abuse its Discretion in Failing to Exclude Pimping and Prostitution Evidence Under Evidence Code Section 352

Defendant's second argument is that the trial court should have excluded the pimping and prostitution evidence under Evidence Code section 352. He argues that "[e]ven if evidence that [he] was Palmer's pimp was marginally relevant to show motive, all or at least most of the pimping and prostitution evidence should have been excluded pursuant to Evidence Code section 352; any slight probative value was substantially outweighed by the danger of prejudice and confusion of the issues." As discussed above, the evidence was more than "marginally relevant"—it was highly relevant as to why defendant was at the Brackinridge house.

Moreover, to negate any potential improper use of this evidence, the jury was instructed that it could not use the pimping and prostitution evidence as propensity evidence: "The People presented evidence of other behavior by the defendant that was not charged in this case that the defendant engaged in pimping. . . . In evaluating this evidence consider the similarity, or lack of similarity between the uncharged acts and the

charged offenses. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.” (See CALCRIM No. 375.)

The prosecutor likewise informed the jury during closing argument as to the proper use of the pimping and prostitution evidence: “I suspect the defense is going to get up here and say, well, you know, the prosecutor’s just trying to make him sound like some horrible person who does horrible things just so you convict him based on that alone. And that is not what I’m doing. And I’m not asking you to convict him because he’s a pimp and he’s exploited women. I am not doing that.”

In light of all this, defendant has not demonstrated that any potential prejudice and confusion was significantly outweighed by the probative value of the evidence.

c. The Trial Court Did Not Err In Allowing FBI Special Agent Parker’s Expert Testimony

As noted above, the trial court permitted testimony by FBI Special Agent Parker about the relationship between a pimp and his prostitute. Defendant’s third argument asserts that her testimony should have been excluded because, to the extent it was relevant, it was common knowledge.

Evidence Code section 801, subdivision (a) provides that testimony by a qualified expert is admissible if it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” Defendant claims that the “only asserted relevance of the testimony was to prove [his] financial motive for following Palmer to Brackinridge’s house—that a pimp makes money off a prostitute,” a fact that is common knowledge and does not necessitate expert testimony. The relevance was broader than that, however. It was relevant that a pimp often accompanies his prostitute to a meeting with a client and remains in the area in order to be nearby should the prostitute need assistance, “to protect his commodity as he sees these prostitutes,” a fact that is not common knowledge. (See, e.g., *United States v. Taylor* (9th Cir. 2001) 239 F.3d 994, 998 [“By and large, the relationship between prostitutes and pimps is not the subject of common knowledge”].)

Special Agent Parker's testimony was also relevant to aid the jury in understanding the significance of various items of evidence that were introduced at trial. For example, it shed light on the meaning of defendant's texts, journal entries, rap lyrics, and the ads for prostitution services contained on his cell phone, information that, again, was beyond the common knowledge of the jurors.

d. The Admission of the Pimping and Prostitution Evidence Did Not Violate Defendant's Right to Due Process

Defendant's fourth and final argument pertaining to the pimping and prostitution evidence is that the "admission of extensive, inflammatory evidence of [his] bad character and propensity for violence violated due process." He concedes that the erroneous admission of prior bad acts to prove criminal propensity does not necessarily violate due process, but he claims that the trial court's failure to properly exercise discretion under Evidence Code section 352 violated due process because the admission of the evidence was substantially more prejudicial than probative, which rendered the trial fundamentally unfair. Specifically, he objects that "[t]he jurors could not reasonably be expected to distinguish between the permissible inference that [he] acted in accordance with a motive established by the prior offenses and the impermissible inference that [he] acted in accordance with a character trait established by the prior offenses." As already noted, the court instructed the jury with CALCRIM No. 375, which informed the jury that it could not conclude from the evidence of defendant's prior bad acts that he had a character and was disposed to commit crime. "[T]he jury is presumed to follow the trial court's instructions." (*People v. Fuiava* (2012) 53 Cal.4th 622, 669.) And the prosecutor also told the jury not to convict defendant "because he's a pimp and he's exploited women," and that the evidence was relevant to defendant's motive for being at the Brackinridge house. Lastly, the evidence was highly relevant and not unduly prejudicial. This argument thus fails.

e. Defendant Was Not Prejudiced by Admission of the Pimping and Prostitution Evidence

We have concluded there was no error in the court's admission of the pimping and prostitution evidence. But even if we had concluded otherwise, we would still not reverse because defendant has not shown prejudice arising out of a violation of the federal Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24 [no reversal where error was harmless beyond a reasonable doubt]) or state law (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal warranted only where it is reasonably probable a result more favorable to defendant would have been reached in the absence of the error]). The evidence defendant shot Marcus was so overwhelming that it cannot be said at least one juror would likely have had a reasonable doubt about defendant's guilt had the evidence been limited or excluded all together.

Courtney S. testified that defendant confessed to her that he shot Marcus, detailing his travels to the Brackinridge home, the text he received from Palmer that Marcus would not let her leave, and his actions once he confronted Marcus in the backyard of the home. While defendant argues Courtney had motive to testify falsely (namely, defendant was violent towards her and pushed her into prostitution, among other things), her testimony was corroborated by physical and testimonial evidence. Marcus's parents saw a man, not a woman, shoot their son. Defendant's hat, which contained gunshot residue and his DNA (but not Palmer's), was found in the Brackinridges' backyard in the area of the shooting, while Palmer's pants contained neither blood nor gunshot residue. Surveillance video showed Palmer driving a car identical to Angela Knapp's across the Bay Bridge in the San Francisco direction, with a passenger in the front passenger seat, and Knapp testified defendant had access to her car at that time. Cell phone records placed defendant near the Brackinridge home at the time of Marcus's murder. In light of this evidence, defendant cannot demonstrate he was prejudiced by the pimping and prostitution evidence.

D. The Prosecutor Did Not Commit Misconduct

During the hearing on the motions regarding the pimping and prostitution evidence, the prosecutor represented that he would “stay[] clear” of evidence of “terrible violence by the defendant in an effort to exert control over these prostitutes where he has Tasered them, where he has deprived them of food, where he has beat them, where he has brandished firearms at them,” because he believed it was “very powerful sort of propensity evidence in a way that shows that he is a violent person and thus he’s violent all the time, and that’s not I think the proper use of [Evidence Code section] 1101,” and would likely be excluded under section 352. Defendant claims that despite this representation, the prosecutor “deliberately elicited[] inadmissible evidence of [defendant’s] prior violence against prostitutes and argu[ed] an improper inference of bad character from that evidence in closing argument, in violation of due process.” Specifically, defendant complains that the prosecutor “repeatedly elicited evidence of [his] prior violence against prostitutes”; “deliberately elicited Agent Parker’s expert testimony that pimps are callous, violent, and assaultive toward prostitutes, further impugning [his] character by implication”; “argued the impermissible inference of bad character based on the prior violence and exploitation of young girls during his closing argument”; referred during closing argument to defendant as a “parasite” who manipulated and exploited young girls; and quoted defendant’s texts and rap lyrics that threatened and bragged about violence against prostitutes. This, according to defendant, constituted prejudicial misconduct by the prosecutor.

As a preliminary matter, we note the lack of objection by defense counsel to the evidence and argument defendant now claims constituted prosecutorial misconduct. He thus forfeited his right to challenge this issue on appeal. (*People v. Ervine* (2009) 47 Cal.4th 745, 806 [“A defendant must timely object and request a curative instruction in order to preserve a claim of prosecutorial misconduct”]; *People v. Medina* (1995) 11 Cal.4th 694, 726.) Defendant excuses this omission by claiming “it would have been futile—the bell could not be unrung.” He makes no effort to explain how that was the case. (*People v. Ervine, supra*, at p. 807 [“by failing to make contemporaneous objection

to any of the following comments by the prosecutor, where the record supports no contention that to do so would have been futile, defendant failed to preserve his claims of prosecutorial misconduct”].) If his counsel had objected to the first instance of the prosecutor purportedly introducing improper evidence of defendant’s prior violence against prostitutes or arguing an improper inference of bad character from that evidence, the court could have issued a curative admonition and the subsequent instances may not have occurred. In any case, the absence of any objection is inconsequential, as there was no prosecutorial misconduct.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. ‘ “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” ’ [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘ “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Strickland* (1974) 11 Cal.3d 946, 955.) We have thoroughly reviewed the record, with particular attention to the evidence and argument about which defendant complains, and we conclude he has not demonstrated misconduct by the prosecutor. Contrary to defendant’s suggestion, the prosecutor was not prohibited from introducing *any* evidence of defendant’s violent conduct towards his prostitutes. Such evidence was an extension of the pimping and prostitution evidence that went to the nature of the relationship between defendant and Palmer and explained why he was at the Brackinridges’ home and went into their yard when Palmer encountered trouble. It showed the control defendant had over his prostitutes, which supported the prosecutor’s theory that defendant had a motive to accompany Palmer—his property and investment—to the Brackinridge home and to make sure she, and thus defendant, got paid for her services. As promised, the prosecutor did not attempt to introduce examples of defendant’s extremely violent conduct, such as when he tasered his prostitutes. In

introducing the evidence of defendant's violence as he did, the prosecutor did not engage in deceptive, reprehensible, or egregious conduct that infected the trial with unfairness.

Further, the prosecutor did not encourage the jury to infer defendant's bad character from the evidence. As noted, he explicitly told the jury *not* to convict defendant simply because "he's a pimp and he's exploited women." This was not, as defendant suggests, in an improper use of paraleipsis, as the prosecutor did not repeatedly tell the jury that he was not asking it to convict defendant due to his bad character. (Cf. *People v. Wrest* (1992) 3 Cal.4th 1088, 1106–1107 [repetition of a statement that the prosecutor was not arguing a certain point strongly implied prosecutor was in fact arguing that point].) Defendant has not demonstrated that the prosecutor's closing argument was improper, that it argued inadmissible evidence, or that it invited the jury to decide the case based upon defendant's character rather than the evidence and the law. (See *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075.)

Finally, even if we found misconduct—which we do not—we would not reverse, as the overwhelming evidence of defendant's guilt compels a finding of harmless error.

E. There Was No Cumulative Prejudice

Defendant contends that the cumulative effect of the numerous errors at trial rendered the trial fundamentally unfair in violation of due process. Because we have not found error, there can be no cumulative prejudice.

F. The Matter Must Be Remanded for Resentencing to Permit the Trial Court to Exercise Its Discretion to Strike the Firearm Enhancements

Section 12022.53, subdivision (d) provides a 25-years-to-life enhancement for use of a firearm during certain enumerated felonies, including murder and discharge of a firearm at an inhabited building causing great bodily injury. When defendant was sentenced in July 2016, the statute expressly prohibited a court from striking a firearm allegation. (See former § 12022.53, subd. (h); Stats. 2010, ch. 711, § 5.) Accordingly, the trial court imposed two 25-years-to-life firearm enhancements, one on count 1, the other on count 3.

During the pendency of this appeal, the Governor of California signed Senate Bill No. 620, which as relevant here amended section 12022.53 to give the trial court authority to strike a firearm enhancement. Accordingly, section 12022.53, subdivision (h) now provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2(h).) Defendant contends that the amendment, which became effective January 1, 2018, applies retroactively. The People agree with defendant, as do many courts that have considered the issue. (See, e.g., *People v. Chavez* (2018) 22 Cal.App.5th 663, 712–713; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109–1111; *People v. Arrendondo* (2018) 21 Cal.App.5th 493, 506–507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.) So do we.

As a general rule, amendments to the Penal Code do not apply retroactively. (§ 3.) An exception exists, however, for amendments that reduce the punishment for a specific crime. In what is known as *Estrada* retroactivity, courts presume that the Legislature intended those amendments to apply retroactively to all non-final judgments. (*People v. Brown* (2012) 54 Cal.4th 314, 323–324; *In re Estrada* (1965) 63 Cal.2d 740, 745.) *Estrada* retroactivity applies to sentence enhancements. (See, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 791–792 [*Estrada* rule applies to enhancement under section 12022.6]; *People v. Vinson* (2011) 193 Cal.App.4th 1190 [*Estrada* rule applies to amended section 666]; *People v. Figueroa* (1993) 20 Cal.App.4th 65 [*Estrada* rule applies to drug enhancement under section 11353.6].) Defendant is thus entitled to the benefit of the amendment to section 12022.52, subdivision (h).

Accordingly, and because we do not view the record to be so unambiguous that we can say with certainty the court would not have exercised its discretion to strike or dismiss the enhancements, we remand the matter for the trial court to exercise its discretion. (See *People v. Almanza*, *supra*, 24 Cal.App.5th at p. 1110 [“Remand is required unless the record reveals a clear indication that the trial court would not have

reduced the sentence even if at the time of sentencing it had the discretion to do so”]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428 [“remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements”].) As the Supreme Court stated in *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8, “Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. [Citation.]”

DISPOSITION

The cause is remanded for the sole purpose of allowing the trial court to exercise its discretion under subdivision (h) of section 12022.53. The judgment of conviction is affirmed in all other respects.

Richman, J.

We concur:

Kline, P. J.

Miller, J.

People v. Spikes (A148920; A149766)